authority". This provision read in the light of rule 91(1) makes it sufficiently clear that the intention is not only to exempt the liability of the authority from mere loss but to affirm that the authority will only be liable for such loss if actual fault is established.

Earlier on I referred to the position at common law concerning the exemption from liability. And I also said that in the absence of any special terms in a contract any dealing with the authority should be on the basis of the provisions in the Act and by-laws appertaining to such authority. Therefore in considering this issue it may be necessary in order to arrive at a proper interpretation to apply the basic principles relating to construction of exemption clauses. In *Chitty* on Contracts — General Principles paragraph 693 Vol. I, 22nd ed. it is stated that —

"Exemption clauses must be expressed clearly and without ambiguity or they will be disregarded. Mere general words in an exemption clause do not ordinarily absolve the party seeking to rely on the exemption from liability for his own negligence or that of his servants. The clause must clearly express what its intention is."

And in paragraph 694 it is further stated that —

"Each clause must be considered according to its actual wording, but it must clearly extend to the exact contingency which has occurred."

Further under paragraph 697 the learned author dealing with the effect of exclusion said —

"Liability for negligence may be effectively excluded if words are used which indicate that all damage, however caused, is to be comprehend within the exemption, or which throw the risk upon the plaintiff."

In the instant case after considering the provision of the Act I am forced to the conclusion that it is the intention of the legislature that in exercising its statutory functions with regard to storage of goods the authority shall not be liable for loss of any goods in its custody unless actual fault is established. Such an intention is I think revealed from the clear language used in rule 91(1). This rule seems to emphasize that —

"The authority shall not be liable for any loss ... arising from ... misdelivery ... of goods or from any other cause, unless such loss, ... has been caused solely by the ... negligence of the authority or its officers or servants."

The language used seems to produce the effect that proof of mere loss is insufficient to establish a case for the claimant though it may be sufficient at common law. For that reason it is my view that to succeed a claimant must not only show mere loss of any goods while in custody of the authority, he must also prove that the loss was due to the negligence of the authority, its officers or servants.

In the instant case it is my considered opinion that the appellant is entitled to rely on this rule and for the respondents to succeed there must be proof of not only mere loss in the custody of the appellant but that such loss was caused solely by the negligence of the appellant, its officers or servants. The burden of proof unlike the position at common law by reason of rule 91(1), is cast upon the respondents.

For these reasons it is my judgment that this appeal should be allowed. The order of the learned magistrate is hereby set aside. The appellant shall be entitled to costs of this appeal and in the court below.

Appeal allowed.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

SEAH CHOON CHYE v. SARASWATHY DEVI

[O.C.J. (Syed Agil Barakbah J.) October 22, 1970]

[Seremban — Originating Motion No. 88 of 1969]

Practice and Procedure — Application to enforce undertaking by solicitor — Application by originating motion — Disputed questions of facts — Allegations of fraud and implied misconduct — Application should be made by writ.

Advocates and Solicitors — Solicitor's undertaking — Application for enforcement — Disputed questions of facts — Allegations of fraud and implied misconduct — Procedure.

This was an application by way of originating motion for an order that a date be fixed by the court within which an undertaking given by the respondent, a solicitor, to the applicant, can be completed. The main issue in the case was whether the application by way of originating motion is proper or whether it should be made by way of writ.

Held: as in this case there were disputed questions of facts and allegations of fraud and misconduct, the application should be commenced by writ.

Cases referred to:-

(1) *United Mining and Finance Corporation Ltd.* v. *Becher* [1910] 2 K.B. 296, 307.

(2) *Yap Hong Thin & Anor.* v. *Seenevasam* [1970] 1 M.L.J. 143.

(3) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1969] 1 M.L.J. 232.

(4) *In re Marchant* [1908] 1 K.B. 998.

(5) *Ratna Ammal* v. *Tan Chow Soo* [1967] 1 M.L.J. 296.

(6) *Nederlandsche Handel-Mattschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan* [1959] M.L.J. 173, 175.

(7) *Brendon* v. *Spiro* [1937] 2 All E.R. 496.

(8) *Ng Wan Siew* v. *Teoh Sin* [1963] M.L.J. 103.

(9) *Hill* v. *Fletcher* (1850) 155 E.R. 205.

ORIGINATING MOTION.

Wong Seng Chow for the applicant.

N. Ramachandran for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an application by way of originating motion for an order that a date be fixed by the court within which an undertaking dated the 9th day of January, 1968, given by the respondent, Saraswathy Devi, to the applicant, Seah Choon Chye, can be completed. A copy of the said undertaking was filed together with the applicant's affidavit. The respondent gave the undertaking in her capacity as an advocate and solicitor, to release the transfer signed and delivered to her by her client, K. Murugasu, to one Michael Chong Ngian Fong together with twenty-six certificates of titles charged to the Great Eastern Assurance Co. Ltd., Singapore. The release was to take effect on receipt by the respondent of documents relating to various assignments and the fulfilment of

certain conditions as enumerated in paragraphs (a) to (g) of the undertaking. Further, Saraswathy Devi & Co. were also authorised to release the sum of $310,000 bank draft made payable to Skrine & Co., a firm of advocates and solicitors in Kuala Lumpur, and $40,000 paid to Nadchatirams, a firm of advocates and solicitors in Seremban, in the latter part of 1967, to Skrine & Co., to the credit of Murugasu's account with the Great Eastern Assurance Company. No date was fixed for the undertaking to be fulfilled. Consent to this undertaking was given by Michael Chong Ngian Fong, the applicant and K. Murugasu.

Mr. Wong Seng Chow appeared for the applicant and Mr. N. Ramachandran for the respondent.

Four grounds of objection were raised by Mr. Ramanchandran, namely: —

(1) That the application involves questions of facts in dispute and is not a matter which can be determined by affidavits but by parol evidence due to the allegations of fraud appearing in paragraphs 3, 4, 5 and 16 of the applicant's affidavit. The proper procedure should be by way of writ.

(2) That the application is tantamount to one of specific performance and should commence by way of writ.

(3) That there is no such thing as originating motion as in this application, except in a pending matter.

(4) That the application is premature.

The main issue appears to be whether this application by way of originating motion is proper or whether it should be made by way of writ. In this regard, therefore, I propose to consider items (1) to (3) of the objections together.

The general principles as regards an undertaking of this nature is that it must be given by a solicitor personally and not merely as an agent on behalf of his client. It must be given in his professional capacity as a solicitor and not as an individual. As was said by Hamilton J. in *United Mining and Finance Corporation Ltd.* v. *Becher*,[1] which I accept with respect: —

"It seems to me that the part which solicitors are nowadays well known to play in elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings for the payment of money and of a similar character, and that those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust."

It was urged that this application was tantamount to one of specific performance and therefore should commence by way of writ. It is true to a certain extent that in an undertaking as in specific performance the ultimate object is to require a defendant to do what he has agreed to do. Specific performance on the one hand is an equitable relief given by the court to enforce against a defendant the duty of doing what he agreed by contract to do and a plaintiff may therefore obtain judgment although there has not in the strict sense been any default by the defendant before the issue of the writ. On the other hand, an undertaking given by a solicitor, who is an officer of the court, is on a different footing since the High Court possesses an inherent disciplinary jurisdiction over its officers. The jurisdiction of the courts is based upon the rights of the courts to require its officers to observe a high standard of conduct. The conduct which is required of solicitors is to this extent perhaps raised to a higher standard than that required of ordinary men in that it is subject to the special control which a court exercises over its officers so that in certain cases they may be called summarily to perform their undertakings, even where the contention that they are not liable to perform them is entirely free from any taint of moral misconduct (*per* Hamilton J., *supra*). The purpose is to secure a speedy, convenient or inexpensive mode of trial.

Mr. Ramachandran also referred to *Yap Hong Thin & Anor.* v. *Seenevasam*[2] in which Azmi L.P. in the Federal Court held, dismissing the appeal against the decision of Pawan Ahmad J., that where a person seeks an order of court for possession of premises in the High Court he has to do so by writ of summons in an action. The application was made by way of motion for recovery of possession under section 16(1) of the Control of Rent Act, 1966. The decision is based on the principle that where an Act of Parliament specifically provides the mode in which an application may be made to the High Court it cannot be commenced by any other way. I do not think this authority applies to this case on the ground that it is not based on any statutory provision that provides a particular mode for such application. On the other hand, Mr. Wong cited the case of *Nanyang Development (1966) Sendirian Berhad* v. *How Swee Poh*[3] in which it was held by Raja Azlan Shah J. that where an Act of Parliament does not specify in what form an application may be made to court, the application may as a matter of procedure be made in any form in which the court can be moved and therefore the procedure by originating motion in that case was correct. This was a case where an application was made by originating motion to remove a caveat pursuant to section 327(1) of the National Land Code which although providing avenues to different sets of people to remove a caveat does not provide for the mode in which application should be made for such removal. Again, it is not on all fours with the present case which, as I have pointed out earlier, is not based on any statutory provision. The proper procedure is, I think, discussed in *Cordery* on Solicitors, 5th edition, page 161, as follows: —

"The application should be entitled in the matter of the solicitor, and should be supported by affidavit setting out the undertaking and other material facts. In the Chancery Division it is made by motion, and in the Queen's Bench Division by summons to a judge in chambers. Where the undertaking was given in the Court of Appeal an application to enforce it may be made by motion to that court."

In *Halsbury's* Laws of England, 3rd edition, Volume 36, pages 192-3 para. 263, it is stated that this disciplinary jurisdiction

"... is exercisable summarily upon application by originating summons, or motion or summons, or at the hearing of the proceeding, and in an appropriate case performance may be enforced by attachment or committal."

Thus, Vaughan William L.J. in *In re Marchant*[4] describes the procedure as "what I may call an action commenced in this convenient way by an originating summons". My view is that in ordinary circumstances

an application by way of motion should be the proper mode.

However, the affidavits contain questions of facts which are disputed and involve allegations of fraud and implied misconduct not only against the respondent but against a third party. Where fraud is alleged it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require proof of a high standard (*per* Azmi C.J. (as he then was) in *Ratna Ammal* v. *Tan Chow Soo*[5] quoting Rose C.J. in *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan*[6]). It follows therefore that parol evidence becomes necessary.

In this regard, there appears to be two divergent views. Where alleged misconduct of solicitors arises, it is a matter of discretion for the judge whether affidavits are required and what form of procedure should have been followed. This was the view of Scott L.J. in *Brendon* v. *Spiro*[7] in the Court of Appeal in England wherein at page 503 he says: —

> "The summary jurisdiction which he (the judge) possessed over the solicitors as officers of the court is, for the reasons I have already given, clear. Having that jurisdiction, I think it was for him to exercise his own discretion as to the appropriate procedure for ensuring that the solicitors, who were in the position of respondents to the application, had due notice of what the claim was against them, and sufficient opportunity to meet the claim in any way that it was reasonably necessary for them to do."

On the other hand, in *Ng Wan Siew* v. *Teoh Sin*,[8] Thomson C.J. (as he then was) in the Court of Appeal said at p. 104: —

> "Before departing from the case I should make one observation. ... It is to the effect that these proceedings should have been started by writ and not by originating summons. Theoretically they could have been started either by writ or by originating summons but it has been said again and again that when it is known there is going to be conflict of testimony and a necessity for taking parol evidence the proceedings should be commenced by writ...."

Although this passage relates to the question of costs, the principle of commencement by writ in cases where there is to be a conflict of testimony and parol evidence becomes necessary, should apply. *A fortiori* where that necessity relates to allegations of fraud and implied misconduct on the part of the respondent and which was denied in his affidavit. In my judgment, therefore, this application should under the circumstances be commenced by writ.

With regard to item (3), I think the argument by Mr. Ramachandran that "there is no such thing as originating motion except in a pending cause or matter" is not correct. Order 72 rule 1A of the Rules of the Supreme Court defines "originating summons" as every summons other than a summons in a pending cause or matter. In principle there is no difference between originating summons and originating motion except that the latter is an application in open court and the former an application in chambers. Order 54 rule 1 of the Rules of the Supreme Court requires every application in chambers to be by way of summons. On the other hand, Order 51 rule 1 requires every application made to a judge in court to be by way of motion. The word 'originating' is not defined in the Rules of the Supreme Court as it to be found in the Singapore Rules. However, suffice it to say that it is 'originating' because it originates the process. (See *Odgers* on Pleadings and Practice, 17th Edition, page 349). In my judgment it is not applicable to a pending cause or matter. The same should therefore be construed of an originating motion.

The fourth and last ground is that the application is premature because the undertaking was made subject to a number of conditions being fulfilled. The principle with regard to an undertaking which is conditional is that the conditions must be fulfilled before the undertaking will be enforced. In *Hill* v. *Fletcher*[9] the defendant obtained a judge's order

> "that the plaintiff do forthwith give security for costs, to the satisfaction of the Master, no stay of proceedings in the meantime, the attorney for the plaintiff undertaking to find such security".

It was held that the proper construction of the order was, that the attorney should give the security in case further proceedings were taken and, therefore, that he was not liable to an attachment for not giving the security, no further proceedings having been taken. It is clear that the undertaking to give security by the attorney was conditional upon further proceedings being taken. Further, the Court of the Exchequer refused to fix any time for the giving of security although the order expressly stated that "the plaintiff do forthwith give security for costs". In the case before me, since there are numerous conditions yet to be fulfilled, and for that matter no time limit has been set, the principle stated above should apply.

It was urged that on the strength of the respondent's affidavit dated 1st October, 1969, filed in Civil Suit No. 36 of 1969 referred to by Mr. Wong in his letter to the Assistant Registrar dated 22nd April, 1970, wherein the respondent stated *inter alia*, "the undertaking ... is in the course of being fulfilled" that there should be no objection in fixing the date for completion of the undertaking. With due respect to the learned counsel, I think the whole sentence in the penultimate paragraph should be read and the numerous conditions involving several third parties must be considered. Apart from these, it was submitted by Mr. Ramachandran and conceded by Mr. Wong that prior to the hearing of this application, the twenty-six titles which formed part of the undertaking by the respondent had been released by her former client to the applicant who in turn deposited them with Bank Bumiputra for securing a loan. I am unable to say with certainty the actual reasons behind the applicant's action. However, if he was honest and sincere about it he should have brought this matter to the attention of the court instead of waiting for the other party to raise it in the course of the arguments. Although his action has not frustrated the whole undertaking, I am of the opinion that in the absence of any cogent reasons for having done so, his conduct in the matter does not seem to merit that of a solicitor and an officer of the court. Be that as it may, in the light of the principles already discussed, I have no alternative but to dismiss the application with costs.

Application dismissed.

Solicitors: *Shearn, Delamore & Co.; N. Ramachandran.*